LOW KAY TONG v. LAW DING HOCK

[F.C. (Raja Azlan Shah C.J. (Malaya), Syed Othman & Salleh Abas F.JJ.) June 19 & September 17, 1979]
[Kuala Lumpur — Federal Court Civil Appeal No. 185 of 1977]

Equity — Application for interlocutory injunction — Family estate — Manager of estate inviting beneficiary to assist him in the management — Differences between parties — Whether beneficiary has legal right to be on estate and to manage it — Invitee — Position of.

In this case the respondent, the manager of an oil palm estate had invited the appellant to assist him in the management of the estate, which was a family estate. Subsequently there were differences between them and the respondent brought an action seeking an injunction, damages and accounts. He also applied for an interlocutory injunction pending hearing of the action to restrain the appellant from interfering with the respondent's management of the estate and from entering the estate without prior knowledge or consent of the respondent. The learned trial judge granted the injunction and the appellant appealed.

Held: (1) the appellant was an invitee in the management of the estate and as the invitor, the respondent, has the right to ask him to leave at any time, without even assigning any reason;

(2) on the facts in this case, the balance of convenience lay in favour of granting the interlocutory injunction.

Cases referred to:-

(1) *American Cyanamid Co.* v. *Ethicon Ltd.* [1975] 1 All E.R. 504.

(2) *Wakefield* v. *Duke of Bucclench* (1865) 12 L.T. 628, 629.

(3) *Crabb* v. *Arun District Council* [1975] 3 All E.R. 865.

FEDERAL COURT.

G.S. Nijar (*N. Jegathesan* with him) for the appellant.

Miss G. Ambiavagar for the respondent.

Syed Othman F.J. (delivering the judgment of the Court): The parties are cousins. The respondent is the manager of Mentara Oil Palm Estate (the estate) in Kelantan. In 1976 he invited the appellant to assist him in the management of the estate. Within two months they had differences. The respondent brought an action against the appellant seeking an injunction, damages and statement of accounts. At the same time he applied for an interlocutory injunction pending hearing of the action to restrain the appellant, his servants or agents from interfering with the respondent's management of the estate and from entering the estate without prior knowledge or consent of the respondent. An injunction was granted; hence this appeal.

The estate was started in 1960 by the grandfather of the parties, Low Hoo Siew and his 3 sons. The shares were (1) Low Hoo Siew 1/2. His 3 sons, (2) Low Chin Loo 2/24, (3) Low Chin Chang 5/24, and (4) Low Chin Pan 5/24. No. (2) died in 1960 and No. (4) and No. (2)'s widow were granted L/A. No. (3) died in 1970 and No. (4) and No. (3)'s widow were granted L/A. No. (1) died in 1971 and No. (4) was granted probate. No. (1) in his will devised his 50% share in the estate to No. (4) his son 10%, the respondent, grandson 15%, Low Hai Huat, another grandson 15%, and the appellant, grandson 10%.

No. (1) during his lifetime was the managing partner of the estate. In 1967 he appointed the respondent manager of the estate and the respondent has continued to hold this office.

In September 1976 the respondent obtained a loan for the estate from one Ng Chee Cheong. There seemed to be required that vouchers relating to the loan should be signed by the respondent, the appellant and Low Hai Huat. The respondent then invited the appellant to assist him in the management of the estate but on condition that he would act on the respondent's orders. In October or November 1976 the respondent learnt that the appellant had been obtaining money purportedly for the estate without the respondent's authority. When confronted, the appellant ignored the respondent and made it known to the workers that the respondent had no more authority in the estate. On November 28, 1976 the appellant made a report to the police alleging that the respondent and his friends had threatened to assault him and to set fire to the estate's factory and the estate itself. The respondent also came to know that the appellant had transported palm oil out of the estate without the respondent's knowledge and authority. By a letter dated December 7, 1976 the respondent gave the appellant notice to leave the estate. The notice contained 3 specific allegations against the appellant: (1) quarrelling and creating ill-feelings with the labourers and staff of a neighbouring estate knowing full well that the two estates are situated in the most troubled area in the country; (2) permitting a 16 year old boy to drive a heavy duty tractor in transporting palm nuts; (3) removing 5 tons of palm oil without the respondent's knowledge and authority. The appellant did not appear to have heeded the letter. On December 15, 1976 the appellant lodged a report to the police stating that there had been a fire in the waste area in the estate's factory.

The affidavit of Low Chin Pan, the surviving partner of the estate, filed by the respondent's side, is to the effect that after death of the 3 partners, he and the co-administrators of the estates of his two other brothers agreed to wind-up the estate, but their present solicitors have been having difficulties in getting some files from the former solicitors. It also says that the appointment of the respondent as manager of the estate has not been terminated and there has been no complaint against the respondent in the management of the estate.

In seeking to resist the respondent's application for an injunction and to maintain that he (the applicant) had the right to be in the management of the estate, the appellant deposed in his affidavits to the effect that the respondent was incompetent; unable to manage the estate by himself, in 1976 the respondent invited the appellant to assist him; the appellant assisted him to raise funds to resuscitate the estate; the appellant is entitled to 10% of Low Hoo Siew's share of the estate and to additional share from the estate of his father, Low Chin Chang (deceased); and he was nominated to the management of the estate by the beneficiaries and administrators of the estates of Low Chin Loo and Low Chin Chang.

The learned trial judge's reasons for granting the injunction may be summarised thus: Differences between the parties which arose were at the making of the appellant himself. Without authority he took further sums from Ng Chee Cheong and transported palm oil from the estate. He tried to prevent the respon-

dent from returning to the estate by informing the workers against the respondent. He informed them that the respondent had no more authority in the estate. He made police reports against the respondent. If it was taken that he was an employee, the appellant's services had been properly terminated. The appellant was not justified in assuming management of the estate and ousting the respondent.

It is contended that the learned trial judge in granting the injunction erred in that he resolved conflicts of evidence, in finding that there was employment relationship between the parties and in not considering properly the balance of convenience. For this contention reference is made to *American Cyanamid Co.* v. *Ethicon Ltd.*[1] where at page 510 Lord Diplock dealt with the supposed rule — to put it briefly — that the court should not grant an interlocutory injunction unless the plaintiff succeeded in establishing a *prima facie* case or a probability that he would be successful at the trial of the action. He said:

"Your Lordships should in my view take this opportunity of declaring that there is no such rule. The use of such expressions as 'a probability', 'a *prima facie* case', or 'a strong *prima facie* case' in the context of the exercise of a discretionary power to grant an interlocutory injunction leads to confusion as to the object sought to be achieved by this form of temporary relief. The court no doubt must be satisfied that the claim is not frivolous or vexatious; in other words, that there is a serious question to be tried."

He then went on and dealt with the manner of assessing balance of convenience for the purpose of granting an interlocutory injunction:

"It is no part of the court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed arguments and mature considerations. These are matters to be dealt with at the trial. One of the reasons for the introduction of the practice of requiring an undertaking as to damages on the grant of an interlocutory injunction was that 'it aided the court in doing that which was its great object, viz abstaining from expressing any opinion upon the merits of the case until the hearing' (*Wakefield* v. *Duke of Buccleuch*).[2] So unless the material available to the court at the hearing of the application for an interlocutory injunction fails to disclose that the plaintiff has any real prospect of succeeding in his claim for a permanent injunction at the trial, the court should go on to consider whether the balance of convenience lies in favour of granting or refusing the interlocutory relief that is sought."

I shall leave the allegation that the trial court was resolving conflicts of evidence and the application of balance of convenience to the present case till later. For the immediate purpose I will deal with the allegation as to the finding that there was an employment relationship between the parties, since, it is said that this finding has adversely affected the right of the appellant to be in the management of the estate.

In the earlier part of his judgment the learned trial judge dealt with the admission by the appellant that he came to be involved in the management of the estate by the invitation of the respondent on the respondent's own admission. He said:

"In the hearing of the motion before me, Counsel for the defendant stated that the defendant's going into the estate was at the request of the plaintiff and the defendant now claims that right.

That being the case, the defendant will be in the position of that of an employee of the estate. He was invited to join the estate at the invitation or in other words on being appointed by the plaintiff who as a Manager made such appointment and the defendant accepted such appointment. There is no evidence to the contrary that the plaintiff had no authority to make such appointment. As he had the power to make the appointment, the plaintiff had the power of dismissal."

Towards the end of the judgment, the learned trial judge considered the conduct of the appellant towards the respondent after the invitation to the management.

For the purpose of representation, it may be accepted that the respondent could not be an employer, and as regards beneficial interest in the estate, he is in no better position than the appellant himself. It may also be accepted that the invitation to manage the estate did not result in employment relationship. But it must be said here, that beneficial interest in the estate is not relevant to the question to be determined. It is, as the learned trial judge indicated in his judgment, the right to the management of the estate.

The appellant, by an affidavit, challenges the right of the respondent to take action against the appellant on behalf of the partnership. It is argued that while the respondent has the right, not as an employer but as an employee, to be in the management, he has no right to prevent the appellant from being in the management; and that, by reason of the invitation to the management by the respondent, of the nomination to the management by the two estates, and of the appellant having been put to risk by the loan, he has an equitable right to be in the management of the estate. In support of this contention reference is made to the equitable principle of estoppel as enunciated in *Crabb* v. *Arun District Council*[3] where at page 871 Lord Denning M.R. said:

"'The basis of this proprietary estoppel — as indeed of promissory estoppel — is the interposition of equity. Equity comes in, true to form, to mitigate the rigours of strict law.... Short of an actual promise, if he', (the promisor) 'by his words or conduct, so behaves as to lead another to believe that he will not insist on his strict legal rights — knowing or intending that the other will act on that belief — and he does so act, that again will raise an equity in favour of the other, and it is for a court of equity to say in what way the equity may be satisfied. The cases show that this equity does not depend on agreement but on words or conduct'."

The whole foundation of this case is that equity will help if the person who has legal rights (in the present case, it would be the respondent) by words or conduct or so behaves as to lead another to believe that he will not insist on his strict legal rights. The denial by the appellant that the respondent has any right to the present action, and the argument that the respondent has no right to stop the appellant from being in the management, is in effect to deny that the respondent has legal rights at all. If he does not have legal rights, he then cannot be a promisor envisaged in *Crabb's* case; and the principle does not therefore apply, as it relates to a person who has legal rights. Even taking that the appellant accepts that the respondent has legal rights, the principle cannot also be said to apply, as there is nothing to show that the respondent promised the appellant that he would take the appellant into the management of the estate in return for signing the vouchers concerning the loan. There is also nothing to show that the respondent in any way led the appellant to believe that he could continue to be in the management of the estate, despite misconduct or usurpation of authority. In any case, it is not

disputed that the appellant was an invitee. The principle does not appear to extend to an invitee — more so to one who has overstayed.

As regards the appellant's claim that he has a right to the management by reason of his having beneficial interests in the estate through the estates of his grandfather and his own father, suffice it to say, if such beneficial interests can be regarded as giving a right to management, I am afraid, there will be a mad scramble by other beneficiaries from the estates of the three deceased persons in this case. The beneficiaries may have other rights to or interests in the estate, but a right to the management can only be conferred by the surviving partner, executors and administrators of the deceaseds' estates jointly. It need only be observed that even the executor and the co-administrators of the deceased persons' estates themselves appear to respect the position of the respondent and they make no claim to the right of management.

The respondent's claim to have been nominated to the management of the estate by the beneficiaries and administrators of the two estates is based on the affidavit of Ng Teck Puay (*f*), an administratrix of the estate of Low Chin Chang, his deceased father. Ng Teck Puan (*f*) is the appellant's mother. In her affidavit she says that she nominated the appellant to look after the interests of the estates of Low Chin Chang and Low Chin Loo. In making the nomination for the estate of Low Chin Chang, Low Chin Pan, the co-administrator, could not have agreed with her. As the sole surviving partner, he has deposed that there has been no complaint against the respondent. She clearly has no authority to make the nomination for the estate of Low Chin Loo, as she has no interest in this estate. Without the need to go further, the nomination was clearly improper. Even as a co-administratrix she does not appear to have proper authority to make the nomination.

Coming to the question of the appellant being put to risk, there seems to be no dispute that the loan was given to the estate, and not to the respondent personally or jointly with the appellant and the third person as the appellant seems to suggest. The indications are that, as stated by the respondent's side, liability is that of the estate and not that of any of the individuals. There is no indication by Low Chin Pan, the surviving partner, that the loan was unnecessary and the estate is in such a state that it would not be able to meet any commitments. Signing vouchers relating to the loan in the circumstances of the case does not, by itself, give equitable, much less legal, right to management. It may give rise to other rights. In any case, there is an allegation of fraud in this area by the respondent's side. The extent, if any, can only be determined at the trial.

It may be accepted that the learned trial judge was using expressive terms in dealing with certain aspects of the evidence, particularly in determining the appellant's position in the management as invitee and his conduct in the estate and towards the respondent. But it cannot be said that he was in effect resolving conflicts of evidence. It should be borne in mind that the respondent in his affidavits focussed attention on the fact that the appellant was a mere invitee and his conduct whilst in the management of the estate and that he had put the respondent in bad light as manager of the estate. The appellant, on the other hand, highlighted the incompetency of the respondent in general terms and his own right as beneficiary to be in the management of the estate, whether or not the respondent liked it. He did not offset these facts. Too many things happened during his short tenure in the management. Before he came in, there had been no indication of anything untoward happening in the estate. From the affidavits and sequence of events, it seems that he wanted to make it appear that the respondent was responsible for the fire. This is borne by the fact that in his first report he said the respondent had threatened to assault him and to burn the estate. He accused the respondent of being incompetent and of mismanagement despite the fact that the respondent had the run of the estate for about 10 years, when he himself was on the management for a few months. In making his assessment, he did not appear to have consulted Low Chin Pan, the surviving partner of the estate, who holds a dominant interest in the estate. Indeed, as found by the learned trial judge, the appellant called this man the respondent's stooge. All these facts, not to mention other side ones, (e.g. continuing to send out the products of the estate without authority) go to show that the two together cannot get along in the management of the estate. It is obvious one should go, whatever right he may have; otherwise, there would be trouble. The main consideration is that in the management of the estate the appellant was an invitee. The respondent, as the invitor, has the right to ask him to leave at any time, without even assigning any reason. An invitee has no right to claim extension of invitation after its expiry. Apart from this, with the appellant's record of behaviour as disclosed in the affidavits, the balance of convenience in no way can be said to favour him. It lies in favour of granting the interlocutory relief sought.

As to the kind of injunction, the motion was for an interlocutory injunction, pending the hearing and determination of the suit, and the trial court after delivering judgment granted an order in terms of the motion (See page 107 of the Record). But in the extraction of the final order, the draft of which must have been approved by both sides, there seemed to have been a lapse, and a permanent injunction was issued. The order extracted is hereby ordered to be varied accordingly.

As to undertaking in damages by the respondent, I do not see the need for this. The only damage the appellant has suffered, so far shown, is a bruised pride of his own making. As an invitee he should not have overstayed. The appeal is therefore dismissed.

Costs. From the way of the appeal, the appellant would have appealed even if an interlocutory injunction had been granted, but it must be said that the respondent should have exercised more care in finalising the order that was extracted. There shall be no order as to costs in this appeal.

Appeal dismissed.

Solicitors: *John Ang & Co.; Ambiavagar & Co.*